No. 3079.

In the United States Circuit Court of Appeals, Ninth Circuit.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR,

v.

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

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INDEX.

CASES CITED.

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BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

STATEMENT OF CASE.

This suit was instituted by the United States against the Atchison, Topeka & Santa Fe Railway Company to recover penalties for violations of the Federal hours-of-service law (34 Stat. L. 1415). The complaint consisted of 16 counts involving the service of 3 train crews. Trial was had to court and jury, and upon the conclusion of the evidence counsel for plaintiff having moved for a directed verdict in its favor as to each of the said 16 counts the same motion was granted, a verdict in accordance therewith returned, and judgment thereon duly ordered and entered. The opinion of the court below is reported in 236 Fed. 154.

Counts 1 to 6 relate to the service of a train crew of six men in charge of the defendant's train "Extra

3203 east," or "1st 34D," running from Bakersfield to Barstow, in the State of California, in excess of the statutory limitation of 16 hours, the hours of service alleged being from 4.50 p. m. on October 4 to 11.05 a. m. on October 5, 1914, a period of 18 hours and 15 minutes continuous service.

Counts 7 to 11 relate to the service of a train crew of five men in charge of the defendant's train "Extra 955 west," running from Needles to Barstow, in the State of California, in excess of the statutory limitation of 16 hours, the hours of service alleged being from 1.20 p. m. on October 10 to 6.20 a. m. on October 11, 1914, a period of 17 hours continuous service.

Counts 12 to 16 relate to the service of a train crew of five men in charge of the defendant's train "Extra 1656 east," running from Barstow to Needles, in the State of California, in excess of the statutory limitation of 16 hours, the hours of service alleged being from 9.15 p. m. on October 21 to 2.15 p. m. on October 22, 1914, a period of 17 hours continuous service.

The defendant's answer admitted that the persons named in the complaint were and that each of said persons was, at the times stated therein, detained in the service of defendant for the purposes and between the points in said complaint stated, and that said persons during the times of such detention were engaged in interstate commerce as employees of this defendant, which was at the times and places stated engaged in interstate commerce substantially as alleged.

By way of an affirmative defense to counts 1 to 6, defendant answered that the train involved, "Extra 3203 east," or "1st 34D," was delayed and detained en route at a station called Cable, Cal., for a period of 2 hours and 25 minutes, on account of said train breaking in two, and that said break in two and delay was the result of a cause not known to the defendant, its officers or agents in charge of said employees, at the time said train and employees left the initial terminal, and that the same was caused by an unavoidable accident, and one that could not have been foreseen by any of its officers, agents, or employees, praying that the delay of 2 hours and 25 minutes be allowed defendant and that the provisions of the hours-of-service act shall not apply to defendant in counts 1 to 6, and that defendant go without day.

A similar answer was filed as to counts 7 to 11, except in that the train involved, "Extra 955 west," was delayed at Danby, Cal., for a period of 1 hour, on account of the breaking in two of an opposing train known as "Extra 1641 east," and the pulling of drawbars fron D. S. L. car 51202 and breaking of a knuckle on A., T. & S. F. car 86671, by reason whereof the track over which "Extra 955 west" was moving became blocked and impassable, with a prayer that the delay of 1 hour be allowed defendant and that defendant go without day as to counts 7 to 11.

A similar defense was filed as to counts 12 to 16, except in that the train involved, "Extra 1656 east,"

was delayed at milepost 691 for a period of 4 hours and 25 minutes on account of said train breaking in two, concluding with a prayer that the delay of 4 hours and 25 minutes be allowed defendant and that defendant go without day as to counts 12 to 16.

Defendant seeks a reversal of the judgment of the trial court on 18 assignments of error, which may be condensed into the following:

1. Error in denying defendant's offer of proof relating to changes in methods, practices, and properties, also as to expenditures, in anticipation of date when hours-of-service law would become effective, for the purpose of minimizing possibility of violations of such law, in the exercise of care, prudence, and foresight consistent with the practical operation of its railroad. (Assignment 1.)

2. Error in permitting counsel for plaintiff, on cross-examination of defendant's witness, to inquire into causes and duration of delays to the train involved in counts 12 to 16, in addition to the delay of 1 hour and 20 minutes at milepost 691. (Assignment 2.)

3. Error in finding it the duty of the defendant to have relieved the employees involved at the expiration of 16 hours, and before arrival at the terminals to which destined. (Assignments 9, 10, 11, 12, 13, and 14).

4. Error in directing a verdict for the plaintiff as to all counts and in ordering judgment thereon. (Assignments 3, 4, 5, 6, 7, 8, 15, 16, 17, and 18.)

These alleged errors will be considered by defendant in error in the order in which they are above set forth.

I.

THERE WAS NO ERROR IN DENYING DEFENDANT'S OFFER OF PROOF RELATING TO CHANGES IN METHODS, PRACTICES, PROPERTIES, AND AS TO EXPENDITURES INCURRED BY THE DEFENDANT IN EFFECTING SUCH CHANGES.

Preparations to avoid violations generally is not an issue.

The offer of proof upon this subject was made by the defendant on the theory as stated by defendant's counsel (Rec. p. 93)—

> and this for the purpose of showing the precautions taken by the defendant for the purpose of enabling its trains to be so run over that division as to minimize the possibility of violations of the hours-of-service law.

This offer of proof was renewed by the defendant as stated by its counsel on pages 93, 94 of the record as follows:

> I do this in no spirit of unnecessarily consuming time, but I believe that, in fairness to the court, attention should be directed to the fact that the decision referred to by counsel and from which counsel read as supporting his ground of objection—the case of *St. Louis, Iron Mountain & Southern Railroad Company* v. *McWhirter* from the Court of Appeals of Kentucky—has been reversed by the Supreme Court of the United States, and that the same court in the case of *Northern Pacific Railway* v. *Washington*, in 222 U. S., at page 370, in re-

> ferring to the period elapsing between the date of the enactment and the effective date of the enactment, stated that such period was intended to enable the necessary adjustments to be made to meet the new conditions created by the act. In view of that expression, which also is found in the decisions of the Court of Appeals of the various circuits, defining the degree of care which carriers should exercise, I respectfully submit that such testimony is admissible for the purpose indicated in the offer.

It is therefore clear that the purpose of the testimony intended to be introduced under the offer of proof made by the defendant was to show the exercise of due diligence on its part *generally* in avoiding violations of the statute involved. In other words, the contention advanced was that such general diligence is material as to whether *at the times involved* the defendant had or had not violated the law.

It is submitted that this proffer of testimony was very properly denied by the trial court, and that this contention has been sustained in cases where the proposition has been advanced.

In the case of *United States* v. *Norfolk & Western Railway Co.* (not reported), tried before District Judge Keller, of the Southern District of West Virginia, at the September term of 1913, that court, in instructing the jury, said:

> The court further instructs you that the requirements of the act of Congress known as the hours-of-service statute are absolute, and that to require or permit any employee or em-

> ployees named therein to remain on duty beyond the statutory limit of 16 hours is unlawful, and the common-law rule of reasonable care and diligence is not a defense, where in point of fact the excess hours of service were not the necessary result of one of the exceptions contained in said statute, namely, casualty, unavoidable accident, act of God, or where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employees left the terminal and which could not have been foreseen.

To the same effect was an instruction to the jury by District Judge Dayton for the Northern District of West Virginia, in the case of *United States* v. *Baltimore & Ohio Railroad Co.*, tried at Philippi, on November 21, 1913.

In the case of *United States* v. *Oregon-Washington Railroad & Navigation Co.*, 213 Fed. 688, Judge Rudkin said:

> It is now well settled that the safety appliance and kindred statutes impose positive and absolute duties on carriers, the nonperformance of which is not excused by the exercise of reasonable diligence or due care on their part, and the hours-of-service act admits of no other rational construction. (*St. L., I. M. & S. Ry.* v. *Taylor*, 210 U. S. 281; *C., B. & Q. Ry.* v. *U. S.*, 220 U. S. 559; *Delk* v. *St. L. & S. F. R. R.*, 220 U. S. 580.)

The cases just cited sustain the proposition that due care and diligence do not excuse service in violation of the terms of the statute.

This excludes any evidence as to the *general* activities and efforts to prevent violations *generally* by a particular carrier.

But in the determination of the question whether in a given instance the law was violated it has been held by this court and other courts that where casualty or unavoidable accident causes delay to a train in the course of its journey the carrier is bound to exercise diligence to relieve such train crew at the expiration of 16 hours' service or as soon thereafter as is practicable consistent with the exercise of such diligence. (*San Pedro R. Co.* v. *United States*, 9th C. C. A., 220 Fed. 737; *B. & O. R. R. Co.* v. *United States*, 6th C. C. A., 242 Fed. 1.)

The diligence by these decisions made the standard test for determination of the question of violation or not, is clearly diligence in the *particular instance*, diligence in effort to relieve, either by sending relief to meet the train, or an availing of an opportunity to utilize other employees at some point through which the train passes, or diligence to relieve by a telegraphic order to the crew *in question* to tie up at some available siding.

Upon this issue, and it is upon this issue alone that *any* evidence of diligence is admissible, evidence of efforts or preparations made or expense incurred in a general supervisory way to prevent violations is clearly inadmissible.

That a carrier may have made general anticipatory efforts and regulations at large expense to comply

generally with the statutory requirements is entirely consistent with the fact that in a particular instance to which controversy relates it has kept a crew on duty in excess of the statutory period without the diligent effort to relieve them required by the rule laid down by the courts.

The evidence the carrier sought to introduce related to "changes in methods, practices, and properties made * * * *in anticipation of the effective date of the hours-of-service act* and for the purpose of securing compliance therewith." (Carrier's Brief, p. 13.)

The effective date of the act was March 3, 1908.

The alleged violations were all in October, 1914.

The anticipatory work before March 1908, had no relevancy or materiality in determining whether conditions arising during a trip in 1914 were met by the exercise of the diligence which *these conditions* called for.

The offer was too general. It had too wide a scope. It was irrelevant to the particular issue. The admission of the evidence sought would have been prejudicial to the Government, in that it would have tended naturally to have obscured the particular duty to relieve this train by a consideration of the carrier's previous expenditures and preparations.

It is therefore submitted that the denial by the trial court of the offer of proof made the basis of the first assignment was not error.

II.

THERE WAS NO ERROR IN PERMITTING CROSS-EXAMINATION OF DEFENDANT'S WITNESS AS TO CAUSES AND DURATION OF DELAYS TO THE TRAIN INVOLVED IN COUNTS 12 TO 16, IN ADDITION TO THE DELAY OF 1 HOUR AND 20 MINUTES AT MILEPOST 691.

Defendant's objections to this testimony were: (1) That it was not proper cross-examination and (2) the testimony was incompetent, irrelevant, and immaterial. (Rec. p. 285.)

With respect to this assignment of error it is respectfully submitted that it is not well taken for the following three reasons:

1. The testimony was proper cross-examination. Defendant's answer set up a delay of 4 hours and 25 minutes at milepost 691 on account of the train breaking in two, and claimed exemption to the extent of such delay. (Rec. pp. 28, 29.) Conductor Powell's testimony on direct examination was: "We were delayed on that trip by *causes* other than the usual causes in meeting other trains, taking water and causes usually encountered, at milepost 691, where we had an unusual delay, which delayed us the *first* time from 2.20 a. m. until 3.40 a. m. on October 22, 1914." (Rec. pp. 279, 280.) "From the time the break in two occurred until the time we returned from Ash Hill to the point where it occurred 1 hour and 20 or 40 minutes, something like that, had elapsed." (Rec. p. 283.) It was during this period the injured car was chained up and set out. On cross-examination, without objection of defendant's counsel, the witness further testified: "We had a

further delay there at milepost 691. We returned with the engine from Ash Hill and coupled into the train. I coupled the air on the train and discovered that on the second car behind the end sills had been mashed in and it could not be handled." (Rec. p. 285.)

In view of the defendant's answer setting up a delay of 4 hours and 25 minutes, the statement of the witness that the train was delayed at milepost 691 by *causes* other than usual causes; that the witness had stated that the first case, entailed a delay of from 1 hour and 20 minutes to 1 hour and 40 minutes; that there was a further delay at milepost 691, where the witness discovered that the second car had been injured, it is respectfully submitted that the question of plaintiff's counsel, "Q. How much longer were you detained there as a result of the second accident?" was clearly proper on cross-examination.

2. The question was also competent, relative, and material to the issue in the case as to the nature of the accident causing the delay, the extent of the effect of the accident on the movement of the train involved, and as stated by the trial court, "I think it is proper to inquire into this delay and all the circumstances surrounding it." (Rec. p. 285.)

The defendant's theory advanced at the time seemed to be that if a crew be kept on duty 1 hour in excess of the statutory limitation; then, a showing by the carrier of that amount of delay resulting from one or more of the exempting causes makes out a defense in that particular case. And this seems to be

the general theory advanced throughout the case by the defendant. In other words, it is insisted by the plaintiff in error that where a train is delayed an hour or 2 hours by reason of a casualty unavoidable accident, or other cause named in the proviso, the carrier in such case may lawfully keep the employee on duty in excess of 16 hours the amount of such delay. This question is more fully discussed under the fourth heading of this brief.

3. If by any theory it should be determined that the testimony objected to was not proper cross-examination or not material to the issue in the case, still it was not prejudicial error, but in fact was favorable to the defendant as showing a delay in excess of that due to disposing of the first wrecked car, and went toward making up the amount of delay alleged in the answer to the last five counts of the declaration. See the case of *Nailor* v. *Williams*, 8 Wall. 107, 109, wherein the Supreme Court of the United States said:

> But where question is asked which is illegal only because it may elicit improper testimony, and the court permits it to be answered against the objection of the other party, * * * if the answer is favorable to the objecting party, it works him no injury.

Furthermore, whether the answer was favorable or unfavorable to the defendant, the result of the case must have been the same. It could in no way affect the failure of the defendant to sustain the burden of proof in bringing itself within the terms of the proviso,

which was the ground in which the plaintiff's motion for a directed verdict was sustained. See *Cavazos* v. *Trevino*, 6 Wall. 773, and *Wilson* v. *Hoss*, 131 U. S. Appx. CCX. In the former case it was held:

> Where the admission or rejection of evidence could not change the result, such motion of the court constitutes no reason for reversing the judgment.

III.

THE TRIAL COURT DID NOT ERR IN DIRECTING A VERDICT FOR THE PLAINTIFF AS TO ALL COUNTS AND IN ORDERING JUDGMENT THEREON.

Outside of the testimony relating to the character of the accidents with respect to whether avoidable or not, and as to whether the same could have been foreseen, the following facts appeared:

1. The crew involved in the first six counts in making the run from Bakersfield moved over the defendant's line to Kern Junction, a distance of 1.7 miles. From the latter point to Mojave the run was over the tracks of the Southern Pacific Company and under the control and direction of that company's dispatcher stationed at East Bakersfield. (Rec. pp. 102, 106.) From Mojave to the destination at Barstow movement was over the defendant's line and under the charge of its dispatcher at Needles, Cal. The employees connected with this train went on duty at Bakersfield at 4.50 p. m. on October 4, 1914; left Bakersfield at 5.35 p. m.; arrived at Cable, the point of accident, at 11.50 p. m.; left Cable at 2.45 a. m. of October 5; arrived at Mojave at 6.10 a. m.; arriving

at Barstow at 11 a. m., being relieved at 11.05 a. m. after a total service of 18 hours and 15 minutes. Of the 2 hours and 55 minutes delay at the point of accident, defendant claims 2 hours and 25 minutes as being allowable to it by reason of the accident (answer, Rec. p. 26), the other delay of 30 minutes due to meeting trains (Rec. p. 103) not being relied on. But for the delay at Cable, Conductor Jones testified that the train could have reached its destination within 16 hours (Rec. p. 104) had there been no further delays.

Had it not been for the delay at Cable the Southern Pacific dispatcher stated, it is reasonable to believe that but for the accident the train would have arrived at Mojave 4 hours and 20 minutes earlier than it did. (Rec. pp. 134, 146.) Defendant's dispatcher at Needles testified as follows on behalf of defendant (Rec. pp. 181, 182):

> Q. Are you able to state what movement you may have accorded first 34D had it not met with a delay at Cable?
>
> A. The movement would have been no better, nor as good, as it was in this particular case, because the delay at Cable, *which we took advantage of as an unforeseen contingency to extend the time of this crew*, left barely enough time to make the run to Barstow. * * * Had I received this train at Mojave at 2 a. m. I could have put it into Barstow at 8 a. m.

2. The crew involved in counts 7 to 11 went on duty at Needles at 1.20 p. m. on October 10, 1914, left Needles at 2.20 p. m., arrived at Danby at 7.30 p. m.,

at which point they were delayed by the accident to the eastbound train, 1641, which blocked the main line west of Danby; left Danby at 10.10 p. m. and was released at its destination at Barstow at 6.20 a. m. on October 11, after a total service of 17 hours. The delay due to the accident was from 9.10 p. m. to 10.10 p. m. on "account extra 1641 east breaking in two and pulling out drawbar, etc." (Rec. p. 196.) "Extra 955 west would have been compelled, even had the line not been blocked, to remain at Danby from 7.30 until 9.10 in order to meet at that point No. 4, No. 7, No. 1, and the first and second sections of No. 9, all of which were first-class trains." (Rec. p. 198.) "No. 955 under ordinary circumstances would have been delayed at Danby until 9.10 in allowing all these passenger trains to go by, and our claim is that the only delay to No. 955 caused by the accident to 1641 east was the delay of 1 hour from 9.10 until 10.10, when 955 left Danby." (Rec. p. 203, defendant's trainmaster stationed at Needles.) "This customary and usual running time of a train of the character of 955 between the time the crew went on duty at Needles and the time the train arrived at Barstow would be 12 hours. The regular running time of a train like 955 from Danby to Barstow, counting the usual delays, is 8 hours, and in this case extra 955 west consumed 8 hours and 7 minutes." (Rec. p. 278, Chief Dispatcher Smith, at Needles.)

3. Counts 12 to 16 involved the crew running from Barstow to Needles, which went on duty at 9.15

p. m. on October 21, 1914; left Barstow at 10 p. m., was delayed at milepost 691 from 2.20 a. m. to 3.40 a. m. October 22 (Rec. p. 280) by a pulled-out drawbar (Rec. pp. 282, 286). "We had a further delay there at milepost 691. We were delayed about 3 hours by reason of the second accident," leaving Ludlow about 6.40 a. m. (Rec. p. 285, Conductor Powell), and being released at Needles at 2.15 p. m. (complaint and answer), effecting a total service of 17 hours. The usual running time of a freight train like the one involved between Ludlow and Needles is 8 hours, while this particular train made it in 7 hours and 40 minutes, and but for the break in two would have made the run from Barstow to Needles within 16 hours from the time the crew went on duty. (Rec. p. 292.)

With respect to the usual running time required for freight trains between the terminals in question, Mr. Christie, defendant's division superintendent, fixed the following:

> 12 hours and 30 minutes, Bakersfield to Barstow; 12 hours, Needles to Barstow; and 12 hours, Barstow to Needles. (Rec. pp. 44, 45.)

It is apparent from a consideration of the entire record that the defendant's theory of the case is that, having shown a delay to the trains involved, if such delay results from a cause named in the proviso of section 3 of the act, then the employees so delayed may continue on duty to the terminal to which such trains are destined, without regard to whether it may result in service in excess of 16

hours and regardless of whether such excess service is necessary by reason of the accidents producing the delay.

Attention is directed to the testimony with respect to the usual time required for freight trains of the character here involved. The defendant has failed to justify any excess service, even if their theory of the case should be sustained. The first crew, between Bakersfield and Barstow, were on duty 18 hours and 55 minutes, or 6 hours and 25 minutes in excess of the regular running time, when only 2 hours and 25 minutes are claimed as being unusual delays and such that resulted from the unavoidable accident. The second crew were on duty 17 hours, or 5 hours beyond the regular running time, when only 1 hour is claimed as being an unusual delay resulting from the unavoidable accident. The third crew were on duty 17 hours, or 5 hours beyond the usual running time, when only 1 hour and 20 minutes is relied on by the defendant as resulting from the unavoidable accident.

As said by Foster, D. J., Western District of Texas, in *United States* v. *Galveston, Harrisburg & San Antonio Railway Co.*, 147 D. C. Law, wherein a similar question arose—

> The schedule of the run is 12 hours and the crew were engaged in work 18 hours and 20 minutes. So, eliminating the delay claimed as unusual and unforeseen, 3 hours and 20 minutes, and giving it full consideration, there remains a difference of 3 hours *unaccounted for*, but for which the statute would not have been violated.

The burden devolved upon the defendant to show facts sustaining the proposition that the excess service of the employees involved was the *necessary result* of the causes claimed by the defendant as justifying such service beyond the statutory period. (*United States* v. *Southern Pacific Company,* 220 Fed. 745; *Atchison, Topeka & Santa Fe Railway Co.* v. *United States,* 243 Fed. 114, and cases cited therein.) The defendant did not sustain this burden. There was no proof that the excess service *resulted* from the delays relied upon or that the crews could not have been relieved within the 16-hour period, or that they were relieved as soon as possible in the exercise of that diligence demanded by the statute. It was on this ground that the trial court sustained the plaintiff's motion for a directed verdict, citing the decision of this court in *San Pedro, Los Angeles & Salt Lake Railroad Co.* v. *United States,* 220 Fed. 737, which ruling was reaffirmed in *Atchison, Topeka & Santa Fe Railway Co.* v. *United States,* 220 Fed. 748.

This latter case was affirmed by the Supreme Court of the United States on writ of certiorari, 244 U. S. 336. In that case it was said:

> It was not the intention of the proviso, as we read it, to relieve the carrier from the exercise of diligence to comply with the general provisions of the act, but only to relieve it from accidents arising from unknown causes which necessarily entailed overtime employment and service. (*United States* v. *Dickson,* 15 Peters, 141.) It is still the duty of the

carrier to do all reasonably within its power to limit the hours of service in accordance with the requirements of the law.

In *Baltimore & Ohio Railroad Company* v. *United States*, 6th C. C. A., 243 Fed. 153, the court said:

> If it is found that there was delay from an unavoidable accident or from a cause not known to the railroad agents when the train left Newark and which could not have been foreseen, then the railroad was entitled to add to the 16 hours all the delay, no more and no less, which thereafter occurred as the result of this cause; but it was entitled to do so only if the jury found the existence of all these conditions: (*a*) That from the beginning of the trip, and even before it became apparent or should have become apparent to the train dispatcher that there was danger of not finishing the trip within the time, the railroad used reasonable diligence to avoid delays; (*b*) that as soon as it became apparent or should have become apparent that there was any danger of not getting through on time, the railroad used a very high degree of effort or extreme diligence to get the train through to the end of the run within the time limit; (*c*) that as soon as it became fairly probable that excess service would otherwise be necessary, the railroad used that same high diligence to prevent excess service, either by laying up the train or by sending relief or in any other practicable way; (*d*) that continually and until the service ended the railroad used the same high diligence and by the same means, to the

> end that the excess service, if any, should be as short as possible.
>
> It must be understood that what we have said regarding the diligence required, after the trip begins, in order to get and to keep the right to excessive service, has been said with reference to a case where "the delay was the result of a cause * * * which could not have been foreseen" when the train left the terminal. Only upon the hypothesis that the jury finds the existence of this preliminary extreme care does the exempting clause of the proviso require construction.

As the burden of showing a case within the proviso is on the carrier where 16 hours' service has been admittedly exceeded, the burden of showing the *diligence to relieve* rests upon the carrier, this for the reason that where 16 hours' service has been exceeded the carrier must show the existence of excusing cause. Such excusing cause is a casualty, etc., and that such casualty, etc., *necessarily* caused the excess service must be shown; that is, that the effects of such cause, notwithstanding requisite diligence, *caused* the excess service.

The record shows no relevant evidence that the carrier exercised any degree of diligence to prevent the excess service of these train crews.

Therefore, in a case like the present, where this burden was not met by the carrier, the court was justified in directing a verdict for the Government.

The cases cited in the carrier's brief from the Second Circuit Court of Appeals—*United States* v.

Lehigh Valley Railroad Company, 219 Fed. 532; *United States* v. *New York Central & H. R. Co.,* 218 Fed. 611; *United States* v. *D., L. & W. R. R. Co.,* 218 Fed. 608—are not in point. The issue in those cases was whether or not a casualty or other excusing cause was established under the particular circumstances involved. In this case casualty or unavoidable accident was assumed to have been established, and the issue therefore is whether or not the carrier has shown that *after* the occurrence of the casualty or unavoidable accident that it exercised the requisite degree of diligence to comply with its obligation to relieve the train crew.

The issue arising under the duty to relieve was not argued or decided in either of these three cases in the Second Circuit Court of Appeals.

Therefore, the excerpts from those cases set forth in the carrier's brief have no application upon the question of law here involved. And the comment just made applies also to the case cited in the carrier's brief of *United States* v. *Kansas City Southern Ry. Co.,* 202 Fed. 828.

These cases all arose where the issue was casualty or not, or whether the accident causing delay was or was not an "unavoidable accident."

The case at bar was determined by the court upon an assumption favorable to the carrier that the delays were caused by casualty or unavoidable accident. But the court held that there was no showing of diligence on the part of the carrier *thereafter* to relieve the crew or in any other manner to prevent the

necessary delay from the excusing cause from operating unnecessarily to detain the train crew on duty for an excessive period.

The showing which the carrier claims (Brief, p. 24) it made of diligence and foresight "for the purpose of avoiding *those* things * * * which *caused* the train to break in two" was not a showing of diligence after those things caused the delay to comply with its obligation to minimize as far as could be done the detention of the train crew on duty beyond the 16-hour period.

In the case of *United States* v. *Northern Pacific Ry. Co.*, 215 Fed. 64, decided by this court, the question of the obligation to relieve the train crew does not appear to have been considered by the court; but the court did give some consideration to particular circumstances from which the inference is deducible that there was no lack of the exercise of due care and diligence, for the court said:

> Undoubtedly the train dispatcher both at Tacoma and at Portland would, under ordinary conditions, be held to have known that the delay of train 303 at South Tacoma, and the transfer of its crew and passengers to train 314, could not have enabled them to reach Portland in time for the same crew to return to Tacoma on its regular train 308 without being kept on duty for more than 16 hours without a consecutive rest of 8 hours; but the evidence is uncontradicted to the effect—indeed it could hardly have been otherwise—that both dispatchers were deeply engrossed in arranging

and caring for the movement of the large number of trains, including the necessary wrecking outfits, together with the numerous incidentals, necessarily growing out of such a disaster. Under such circumstances it would not, we think, be reasonable to hold the company liable for their failure to check up the time of service of the various crews of the very numerous trains passing over this particular piece of road at that particular time.

IV.

DEFENDANT'S ANSWER SETS UP NO DEFENSE.

Defendant's answer admits the allegations of the petition.

The allegations of the affirmative defenses therein set forth do not set up a defense.

(*a*) There is no allegation that the service for the periods set forth in the petition was caused by or necessitated by, or resulted from the *train* delays specified.

(*b*) There is no allegation that there was the exercise of a high degree of diligence or of any degree of diligence after the delay to the train in each instance was known to relieve the employees named at the expiration of sixteen hours' service.

As the Government was entitled to judgment on the pleadings—on the case set forth in the carrier's answer—there was no error in the order for the directed verdict.

CONCLUSION.

It is respectfully submitted that (1) as the answer set forth no defense, (2) as the evidence excluded was not material to any issue raised by the answer, (3) as the evidence discloses no exercise of diligence to prevent overservice, and (4) as the answer and the whole record indicate that the carrier relied solely upon the untenable position that delay to these trains from the causes specified gave to the carrier an absolute and unqualified right to extend the period of employees' service to the extent of the time of such delay—there was no error in rulings or in directing verdict or entering judgment on the case made by the carrier in the court below.

Wherefore, it is respectfully submitted that the judgment of the trial court should be affirmed.

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